

STATE OF NORTH DAKOTA
ATTORNEY GENERAL'S OPINION 94-F-18

Date issued: July 1, 1994
Requested by: Jeff Roterling, Adams County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether the clerk of district court is required to release en masse to the news media child support records and files for review.

II.

Whether the clerk of district court is required to release files in paternity cases for review.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the clerk of district court is required to release en masse to the news media child support records and files for review unless either the Supreme Court or the district court has adopted rules restricting who may review the records or the time, place or manner of inspection or the district judge has impounded the files and records and ordered they may not be inspected.

II.

It is my further opinion that the clerk of district court may not release for review or public inspection any papers or records concerning a paternity determination, other than the final judgment, unless the consent of the court and all interested persons has been obtained or upon an order of the

court for good cause shown in exceptional cases.

- ANALYSES -

I.

"[J]udicial records, generally, are accessible to the public for any proper purpose."¹ State v. O'Connell, 151 N.W.2d 758, 762 (N.D. 1967). "[I]t is the right of the public to inspect the records of judicial proceedings after such proceedings are completed and entered in the docket of the court." Id. 763. "[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).

However, "the right to inspect and copy judicial records is not absolute." Nixon, 435 U.S. at 598. See also O'Connell, 151 N.W.2d at 763. "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." Id. Although not specifically stated, this authority is likely based upon a court's common law or inherent powers. "In the absence of legislative enactment, the common law is in effect in North Dakota." Fitzmaurice v. Fitzmaurice, 242 N.W. 526, 527 (N.D. 1932).

Management of judicial records likewise is an inherent power of a court.² Case law that recognizes a common-law right of access is in agreement that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and

¹The open records law codified at N.D.C.C. ? 44-04-18 does not apply to court records because the courts are not one of the enumerated entities covered by that law. Grand Forks Herald v. Lyons, 101 N.W.2d 543, 546 (N.D. 1960).

²This is similar to the police power, which is inherent in state sovereignty "and exists without any reservation in the constitution, being founded on the duty of the state to protect its citizens and provide for the safety and good order of society." State v. Gronna, 59 N.W.2d 514, 539 (N.D. 1953), quoting 16 C.J.S., Constitutional Law, ? 175.

circumstances of the particular case." Nixon, 435 U.S. at 599.

All citizens have equal access to public records without regard to whether they represent the news media. The news media has an important role in the administration of justice because "[i]t not only makes public the events of the court, its rulings and decisions, but also serves as a catalyst for openness and, as such, promotes fairness and trust." Dickinson Newspapers, Inc. v. Jorgensen, 338 N.W.2d 72, 78 (N.D. 1983). However, the news media's rights stem from being a member of the public and not as a special privilege. Id. at 79.

The Supreme Court has cautioned that the right of inspection of court records is subject to reasonable rules and regulations on who may inspect the records and where and how such inspection may be made. As reasoned by the court, unrestricted rights of inspection would disrupt the normal operation of the court; unlimited or unsupervised inspection would risk the exposure of privileged files to persons who are not authorized to see them; and, the unlimited, unsupervised inspection of those records would endanger their safety, possibly resulting in the files being altered or lost. O'Connell, 151 N.W.2d at 763. The probability of files being lost, misplaced, and commingled is heightened if records and files are released en masse.

The clerk of court does not have independent authority to decide questions of access to court records, but acts as an adjunct to the judge. The clerk of court is not a judicial officer, but is part of the judicial branch of government. 15 Am. Jur.2d Clerks of Court ? 1. While the clerk of district court is required to "[t]ake charge of all papers and records, which are filed or deposited in the office of the clerk of court, and safely keep and dispose of the same according to supreme court rule", N.D.C.C. ? 11-17-01(1), and "[k]eep other records and perform other duties as the supreme court directs by rule."³ N.D.C.C. ? 11-17-01(10), the clerk does not have

³The Supreme Court has established a Court Records Retention and Disposition Schedule, AR 19, and a Court Records Management Program under the State Court Administrator, AR 26, but has not made policies addressing media access to court records. The North Dakota clerk of court manual promulgated by the Supreme Court and the Administrative Office of the

independent authority to determine whether records may be disclosed.

Therefore, it is my opinion that the Supreme Court and the district court may adopt reasonable rules relating to who may review the records and files and to the time, place, and manner for that inspection. The clerk of district court may apply to the district court for direction regarding the disclosure of court records.

II.

The common law does not control where an express constitutional or statutory provision states the law. Brignall v. Hannah, 157 N.W. 1042, 1045 (N.D. 1916). See also N.D.C.C. ? 1-01-06. Paternity actions are governed by North Dakota's adoption of the Uniform Parentage Act. N.D.C.C. ch. 14-17. This Act contains a specific provision limiting public access to the proceedings and records of the court.

Notwithstanding any other law concerning public hearings and records, any hearing or trial held under this chapter must be held in closed court without admittance of any person other than those necessary to the action or proceeding. All papers and records, other than the final judgment, pertaining to the action or proceeding, whether part of the permanent record of the court or of a file in any state agency or elsewhere, are subject to inspection only upon consent of the court and all interested persons, or in exceptional cases only upon an order of the court for good cause shown.

N.D.C.C. ? 14-17-19. A state may constitutionally provide for the confidentiality of records of police contacts and court action relating to juveniles. In re Gault, 387 U.S. 1, 25 (1966).

A subsequent proceeding to enforce or alter a parent's child support obligation may relate to a paternity determination

courts addresses the procedures concerning access to public or confidential court files and lists statutes requiring confidentiality. N.D.C.C. ? 27-02-05.1(2)(b). See also N.D. Const. art. VI, ? 3.

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under the Uniform Parentage Act. A district judge has authority to "impound its files in specific cases when justice so requires" under O'Connell, and so could determine that justice required that files relating to the subsequent proceeding be confidential as well. If there is a question whether a document is confidential or closely related to a confidential document, the clerk of court should consult with the judge and seek his or her opinion and instructions.

Therefore, it is my opinion that only the final judgment in a proceeding under the Uniform Parentage Act may be released to the public, unless the consent of the court and all interested persons has been obtained, or upon an order of the court for good cause shown in exceptional cases. It is my further opinion that the clerk of district court may apply to the district court for rules and regulations governing the inspection of court records which take into account statutory requirements, including questions of whether a statutory requirement applies to a particular item.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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